IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 27TH JULY 2007 / 5TH SRAVANA 1929

CRL.A.No. 320 of 2000()

AGAINST THE ORDER IN C.C. NO.1549/1999 OF ADDITIONAL CHIEF JUDICIAL MAGISTRATE (ECONOMIC OFFENCES), ERNAKULAM.

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APPELLANT/COMPLAINANT:

HARRY FERNANDEZ, MANAGING DIRECTOR,
M/S. HARMET TOURS & TRAVELS PVT. LTD.,
SELMAN CHAMBRS, A.L.JACOB ROAD, KOCHI 682 035.

BY ADV. SRI.ANIL S.RAJ

RESPONDENTS/ACCUSED & STATE:

1.T.K.GEORGE, THOPPIL HOUSE, SACHIVOTHAMAPURAM PO.,
KURICHY, KOTTAYAM.

2.STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY ADV. SRI.M.P.KURUVILA JACOB-R1
PUBLIC PROSECUTOR SRI. C.M.KAMMAPPU-R2

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN, J.

CRL. APPEAL NO. 320 OF 2000

Dated this the 27th day of July, 2007

JUDGMENT

This appeal is filed against the order in C.C. No.1549 of 1999 on the file of the Additional Chief Judicial Magistrate's Court (Economic Offences), Ernakulam. The accused - first respondent herein was acquitted by the court below on the sole ground that the appellant - complainant was absent.

2. Heard the learned counsel on either side and perused the records made available before this Court. The impugned order would show that the accused was acquitted on the ground of absence of the complainant inspite of the fact that the complainant had filed an application to condone his absence and to adjourn the case. The order impugned is, therefore, not in accordance with the dictum laid down by this Court in the decisions reported in **Don Bosco v. Partech Computers Ltd., 2005(2) K.L.T. 1003** and **G.F.S. Chit & Loans (P) Ltd. v. Rajesh, 2006(3) K.L.T. 825** wherein it has been categorically held that an order under Section 256(1)

Cr.P.C. can be passed only after ascertaining whether on the date of posting of the case, the personal attendance of the complainant was essential for the progress of the case. In this context, the Apex Court in the decision reported in **Associated Cement Co. Ltd. v. Keshvanand , 1998(1) K.L.T. 179 (SC)** held in paragraph 17 of the judgment as follows:

> "Reading the section in its entirety would reveal that two constraints are imposed on the court for exercising the power under the Section. First is, if the court thinks that in a situation it is proper to adjourn the hearing then the magistrate shall not acquit the accused. Second is, when the magistrate considers that personal attendance of the complainant is not necessary on that day the magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that the complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice."

3. In the light of the above judicial pronouncements and taking into

account the fact that the appellant - complainant had filed an application for adjournment of the case, this Court is of the view that the impugned order is liable to be set aside. Accordingly, the impugned order is set aside and the matter is remanded to the court below for fresh consideration as per law.

The Crl. Appeal is allowed by way of remand. The parties shall appear before the court below on 7.9.2007.

(K.THANKAPPAN, JUDGE)

sp/

K.THANKAPPAN, J.

CRL.A. NO.320/2000

JUDGMENT

27TH JULY, 2007.